

SALES AND USE TAX PUBLIC PARTICIPATION WORKING GROUP

Teleconference Minutes

of

Phase II Task Force One

held **January 28, 1998**, 11:00 am to 12:30pm

I. Welcome and Introductions.

Identified teleconference participants:

Bill Brady (Facilitator)	June Summers Haas (MI)
Roxanne Bland (MTC)	William Lunka (MN)
René Blocker (MTC)	Paull Mines (MTC)
Karen Boucher	Martha Mote (IL)
Merle Buff	Larry O'nan
Alan Friedman	Duston Rose (ID)
Jeff Friedman	Art Rosen
Art Fuerstein	Mark Wainwright (UT)
Oscar Garza	Dale Vettel (MI)

II. Public Comment Period.

Paull Mines reminded the group that participants had been asked to provide specific written proposals for the items sought to be included in the Phase II document. He indicated that more productive discussions may be held on specific proposals. Without written proposals for the group's review the discourse necessarily will be limited to abstract principles.

There was no other public comment.

III. Phase II Task Force One evaluation/consideration of proposed topics.

- a. Temporary/occasional contacts (*Description: Enumeration of a list of in-State temporary or occasional contacts that will not be viewed as creating nexus for the out-of-state business, possibly including but not necessarily limited to:*
- (1) meeting with specified business advisors and professionals;
 - (2) meeting with in-state suppliers of goods or services;
 - (3) meeting with government representatives in-state;
 - (4) holding recruiting/hiring events;
 - (5) advertising in-state through various media;
 - (6) using in-state companies to print promotional items (e.g., catalogs, demo software discs) and accompanying visits to the printing location;
 - (7) using in-state companies to provide manufacturing services and accompanying visits to the manufacturing location;
 - (8) attendance, participation at, taking orders at trade shows;
 - (9) rental to/from in-state entity of customer lists;
 - (10) shipping out-of-state company's unfinished product to unrelated in-state party for processing/temporary storage of goods prior to shipment of goods out of state;
 - (11) attendance at occasional meetings (e.g., Board meetings, retreats);
 - (12) presence of a Web site in-state;
- etc.

Bill Brady (facilitator) led the discussion evaluating the above-listed activities and determining whether nexus clarification of these activities should be included for consideration as part of the Phase II document.

(1) Meeting with specified business advisors and professionals. Apparent consensus that the general category is acceptable, however, more specificity is needed describing the type of in-state activities in which businesses would like to engage and not be held by the State to have nexus. Many indicated that they could not accept a no-nexus rule based on the type of business professional involved in the meeting. **Participating business representatives will provide a detailed proposal regarding this category (including details regarding suppliers of services originally denoted in category (2) (see below)).**

There was general acknowledgement that although certain activities constitutionally may be sufficient to create nexus, under the Phase II statement States would elect not to assert nexus under certain circumstances. The Phase II statement will provide a menu of possible circumstances for the States to select from in determining they might abjure from asserting nexus even when constitutional principles may well support nexus. In addressing the list of activities, most acknowledged that the States would not treat the activities as avoiding nexus, if the activities were of a market enhancement nature.

An argument was advanced that an out-of-state business should be able to engage in all the activities that the States identify as non-nexus producing for numerous times during a tax period in one State and not have nexus in the State as long as the activities were not market enhancing. Others were not so sure that non-market enhancing activities can be pursued in any quantity in a State without creating nexus.

(2) Meeting with in-state suppliers of goods or services. The suggestion was made to separate services from this category because the suppliers of services generally may be viewed differently from suppliers of goods. It was suggested that contacts with suppliers of services more appropriately belong in category (1). In support of this category, an argument was made that States should want to encourage businesses coming into the State to buy the goods and services available in the State's market. Such business activity should be viewed as a benefit to the in-state taxpayers.

(3) Meeting with government representatives in states. It was indicated that States are not likely to relinquish the assertion of nexus if there is a

permanent employee in the State, such as a lobbyist. The question of whether third party representatives lobbying government representatives in the State would create nexus was left unanswered. No conclusion was reached on the viability of this category.

(4) Holding recruiting/hiring events. This category was described as “probably okay”.

(5) Advertising in state through various media. Many sought more specificity in defining “media” and “advertising”. An example was posed regarding whether the location in a State of an advertising kiosk from which direct purchases could be made would create nexus. It appears that States would be willing to consider some portion of this category depending on the proposal actually stated.

(6) Using in-state companies to print promotional items (e.g., catalogs, demo software discs) and accompanying visits to the printing location. The suggestion was made to utilize an existing State statute to use as a basis for discussing eliminating this activity as a nexus creating activity. New York’s “fulfillment house” statute was suggested as a good example. The issue of potential commerce clause discrimination was raised—how can a State treat maintenance of in state inventory as a nexus creating event when it says the maintenance of in state inventory with an authorized fulfillment house is not? It was suggested that the use of one’s own stock of goods/materials is different from what is being proposed in this category (6).

It was noted that category (7) (see below) essentially is the same concept. States appear to be willing to consider these categories with some clarification of the scope of each.

(7) Using in-state companies to provide manufacturing services and accompanying visits to the manufacturing location. Considered to be same concept as expressed in (6) above.

(8) Attendance, participation at, taking orders at trade shows. The States did not indicate a willingness to relinquish nexus when the out-of-state seller takes orders at trade show. However, pure (non-exhibitor) attendance at trade shows appeared to be more acceptable, although it probably does not materially differ from what is proposed in (2). Some States manifested resistance to allowing exhibition at a the trade show without taking orders as a non-nexus creating activity. It was noted that Washington State has a policy of allowing temporary registration solely for trade show purposes.

The group did not have time to discuss the other categories under this topic.

- b. Nexus duration (*Description:* addressing how long nexus lasts, once it is established.) The group did not have time to discuss this topic.

Business representatives interested in participating in drafting proposals for the areas discussed during this teleconference were requested to contact Jeff Friedman of COST at jfriedman@statetax.org.

A **second teleconference of Task Force One** under Phase II has been scheduled for **Tuesday, March 3, 1998**, 11:00am to 12:30pm, Eastern Time. A notice of this meeting will be distributed at least 10 days prior to the scheduled date.